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NOTE

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INTRODUCTION

The global legal order as we know it today developed largely to accommodate and facilitate the modern state system that arose in the wake of the 1648 Treaty of Westphalia. As a result, international law consists primarily of international agreements[1] and customary rules arising out of state practice and recognition.[2] States still remain the primary subjects of international law today, but they are increasingly joined by other actors on

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1. This Note uses the terms international agreement, international treaty, international covenant and international instrument interchangeably to refer to a treaty, as defined by article 2 of the Vienna Convention on the Law of Treaties. Vienna Convention on the Law of Treaties art.2, May 23, 1969, [hereinafter Vienna Convention], 1155 U.N.T.S. 331 (1969).

2. *See* MALCOLM N. SHAW, INTERNATIONAL LAW, 5–6 (6th ed. 2008). For a history of the development of the modern global legal order, *see id*. at 1–11. *See also* MORTON A.

the global stage, including international organizations and individuals–and the global legal order has struggled to adapt and adjust.

One such actor is the European Union (EU)—a quasi-supranational regional organization that asserts supremacy over the municipal law of its Member States within ever expanding internal legal spheres of competence. How does this new actor, which the European Court of Justice (ECJ) has declared to be "a new legal order of international law,"[3] fit into the global legal order? How do the rules of the international system apply to the EU and how does the EU view itself within this frame? In the words of Advocate General Maduro of the ECJ, the risk arose that the EU's legal order and the international legal order might just "pass by each other like ships in the night."[4]

This Note examines the challenge posed by supranational regional organizations such as the EU to one particular field of international law: the international human rights regime. The international human rights regime includes a number of different sources of international human rights law, including international covenants, customary international law and general principles,[5] and this Note will focus in particular on the application of the international human rights treaties within the European context. The EU raises a particular set of problems with respect to the legal effect of the international human rights covenants and the obligations of the Member States that are parties to those agreements. With a few exceptions, the EU itself is not a party to the vast majority of international human rights treaties.[6] Yet nearly all of its Member States have ratified and are bound by the panoply of international human rights instruments, including the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the Convention on the Elimination of Racial Discrimination (CERD), the Convention on the Elimination of Discrimi-

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KAPLAN & NICHOLAS B. KATZENBACH, THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW (1961).

3. Case 26/2, van Gen en Loos v. Nederlandse Administratie de Belastingen, 1963 E.C.R. 1 ¶ 3.

4. Opinion of Advocate General Poiares Maduro, Case C-402/05 P, Yassin Abdullah Kadi v. Council of the Eur. Union & Comm'n of the European Communities, ¶ 22 (delivered on Jan. 16, 2008).

5. *See generally* Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82 (1988–89).

6. The EU ratified the Convention on the Rights of Persons with Disabilities in 2010. Press Release, European Commission, EU ratifies UN Convention on Disability Rights, No. IP/11/4 (Jan. 5, 2011), *available at* http://europa.eu/rapid/press-release_IP-11-4_en.htm. The EU is also in negotiations with the Council of Europe for accession to the European Convention on Human Rights. For an overview of accession negotiations and history, *see generally* European Convention on Human Rights: Accession of the European Union, COUNCIL OF EUROPE, http://hub.coe.int/what-we-do/human-rights/eu-accession-to-the-convention (last visited May 16, 2014).

nation Against Women (CEDAW) and the Convention Against Torture (CAT).[7]

The ECJ has asserted that EU law has supremacy over the municipal law of its Member States within the EU legal spheres of competence, including with regard to the enumeration, definition and enforcement of human rights. The ever-expanding transfer of authority by the Member States to the EU, however, raises numerous questions with regard to the application of the international human rights regime. Do the obligations of the Member States under international human rights treaties extend to these transferred spheres of competence? Does the EU somehow succeed to these obligations? Who can be held responsible for a violation of international human rights law in the EU spheres of competence? Are the EU spheres of competence arising unchecked and outside the international human rights regime?

This Note examines the challenges posed by the EU to the international human rights regime. Specifically, this Note will focus on how the ECJ, the European Court of Human Rights (ECtHR) and the Member States have addressed the question of the relationship of the EU to international human rights law. Together, these three institutions have woven a complex legal paradigm that, this Note argues, situates the EU in a lacuna within the international human rights regime. Part I begins by examining how the ECJ has defined the relationship of EU law to international law, including its position in relation to international human rights law. Part II examines the question from the perspective of public international law and the law of treaties. Next, Part III will review how two key potential external judicial checks, the ECtHR and the Member States themselves, have addressed the relationship of the EU to international human rights law. These two actors, Part III argues, have established relationships of extreme deference to the EU with regard to human rights, which in practice make the ECJ the final judicial authority on human rights within the spheres of EU competence. Finally, Part IV turns to examine whether despite the lacuna, the EU is ensuring compliance of its own accord. While the EU cannot be said at present to be in gross contravention of international human rights, the current legal framework in place indicates a number of systemic weaknesses, a failure to adequately integrate the international human rights instruments and no internal (or external) mechanisms to otherwise ensure compliance.

The EU has emerged largely unchecked by external judicial control mechanisms with regards to human rights, and it has become the final authority on the delineation and definition of human rights within the EU human rights regime. The Office of the United Nations High Commissioner for Human Rights (OHCHR) has expressed the concern that the EU and its current legal framework strike at the heart of the principle of

7. For an updated list of ratifications, reservations and declarations to the main international human rights treaties, please see Chapter IV: Human Rights, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en (last visited May 16, 2014).

universality on which human rights rests, both legally and conceptually.[8] The EU's relationship to international human rights law as it currently stands has created significant gaps in human rights protection in Europe and poses a threat to the integrity of the international human rights regime as a whole.

I. The EU's Perspective: How the EU Defines Its Relationship to International Human Rights Law

The EU defines its legal character as a political entity in large part through the case law of the ECJ, the highest court in the EU in matters of EU law. This self-definition includes both an internal and an external dimension, which together—according to the ECJ—constitute a special, *new* kind of legal order on the global stage. Through the principle of supremacy, the ECJ has asserted and created a relationship internally between EU law and the municipal law of the Member States. Through the principle of autonomy, the ECJ has also positioned the EU externally in relation to international law. By defining itself as this special, *new* kind of legal order, the EU has asserted itself as the supreme and final authority on the delineation and definition of human rights within the EU human rights regime.

A. *The Relationship of EU Law to International Law*

In the landmark 1963 case of *Van Gend en Loos v. Netherlands Inland Revenue Administration*, the ECJ characterized the legal sphere the Treaty Establishing the European Economic Community (EEC Treaty) had created as "a new legal order of international law."[9] A year later, in *Costa v. ENEL*, the ECJ established the principle of the supremacy of EU law over the law of its Member States, finding that "the law stemming from the [EEC] Treaty . . . could not, because of its special and original nature, be overridden by domestic legal provisions, however framedFalse" and that "[t]he transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights."[10] The court reasoned that "[b]y creating a Community of unlimited duration . . . the Member States have limited their sovereign rights, albeit within limited fields, and . . . thus created a body of law which binds both their nationals and themselves."[11]

The extent to which the Member States have limited their sovereignty under the EEC Treaty and subsequent agreements, i.e. the extent of the

8. United Nations Office of the High Comm'r for Human Rights, The European Union and International Human Rights Law, at 8 (2011), *available at* http://www.europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf [hereinafter OHCHR Study].

9. *van Gend*, 1963 E.C.R. ¶ 3 (emphasis added).

10. Case 6/64, Flaminio Costa v. ENEL, 1964 E.C.R. 585, 594.

11. *Id.* at 593.

EU's supranational governance, varies across policy fields.[12] In some, the EU holds exclusive competence, and the EU alone is able to legislate and adopt binding acts, with the Member States' role limited to applying them.[13] In other sectors, the national governments remain the primary policy-makers, while in yet others, competence is shared, and the Member States may exercise their competence only in so far as the EU has not exercised, or has decided not to exercise, its own competence.[14]

According to the court in *Costa v. ENEL*, the EEC Treaty, had "created its own legal system which . . . became an integral part of the legal systems of the Member States and which their courts are bound to apply."[15] Internally, according to the court, the legal order created by the EEC Treaty is different from those created by "ordinary international treaties"[16] and could not be treated as such by its Member States. It still remained for the ECJ to define how this "new legal order" would relate to the rest of international law on the global stage.

The relationship of the EU to international law has developed slowly in the case law of the ECJ, as the court faced new challenges when confronting different fields of international law.[17] Particularly in the early formative years of the European project, the success of the ECJ's first internal assertions of authority and supremacy depended largely on their acceptance by the Member States. Determining whether and how the EU might be bound by the General Agreement on Tariffs and Trade (GATT) necessarily involved different underlying political and economic interests rather than the question of whether the EU is bound by a United Nations Security Council resolution or international human rights law. A Member

12. *See* Division of competences within the European Union, EUROPA SUMMARIES OF EU LEGISLATION, http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0020_en.htm (last visited May 16, 2014) [hereinafter Division of Competences] (explaining that the EU has different level of competences depending on how much power the Member States delegate to it in that policy field); *see also* Alec Stone Sweet & Wayne Sandholtz, *European Integration and Supranational Governance*, 4 J. EUR. PUB. POL'Y 297, 298–99 (1997).

13. The areas where the EU has exclusive competence include the customs union, the establishing of the competition rules necessary for the functioning of the internal market, monetary policy for the Member States whose currency is the euro, and the common commercial policy. Consolidated Version of the Treaty on the Functioning of the European Union art. 3, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU]. *See* also Division of Competences, *supra* note 12.

14. The areas where the EU has shared competence include some aspects of social policy, environment, consumer protection, energy, the area of freedom, security and justice, and certain aspects of common safety concerns in public health matters. TFEU art. 4. *See* Division of Competences, *supra* note 12. Under article 6, the EU has competence to carry out actions to support, coordinate or supplement the actions of the Member States in such areas of action as the protection and improvement of human health, culture, tourism, education, civil protection and administrative cooperation. TFEU art. 6.

15. *Costa*, 1964 E.C.R. at 593

16. *Id.*

17. *See generally*, Robert Schütze, *EC Law and International Agreements of the Member States – An Ambivalent Relationship?,* 9 CAMBRIDGE Y.B. EUR. LEGAL STUD. 387 (2007).

State may be more inclined to disregard the ECJ's assertion that EU law is not bound by the GATT, which involves very concrete and direct economic and political consequences for the Member States, than such an assertion about other types of international law. Defining the relationship of the EU to international law thus had implications on the viability of the broader European project. As a result, during the early period of the Community legal order, the relationship of the EU to international law was, as described by Robert Schütze, an "uneasy" one, characterized by "ambivalence" on the part of the court.[18]

In the famous 1972 *International Fruit* case,[19] the ECJ examined the relationship of EU law to the GATT. The Court addressed the question, *inter alia,* of whether regulations adopted by the European Commission could be held invalid as being contrary to the GATT.[20] The Court responded by creating a succession doctrine in relation to GATT, concluding that "in so far as under the EEC Treaty the Community has assumed the powers previously exercised by Member States in the area covered by the General Agreement, the provisions of that agreement have taken effect of binding the Community."[21] The Court reasoned that by conferring on the European Community certain powers and functions that fell under the GATT, "the Member States showed their wish to bind [the Community] by the obligations entered into under the general agreement."[22] The Community would thus succeed to the obligations of its Member States under the GATT, even though it was not itself a party to the agreement.

In spite of the succession doctrine created in *International Fruit*, the Community became an official member of the WTO on January 1, 1995,[23] thereby formally binding itself to the GATT and rendering the doctrine unnecessary with regard to the relationship of EU law to the GATT. Robert Schütze explains how the succession doctrine largely became a dead letter after that, and lay dormant for several decades without being extended to any other fields of international law.[24] During this period, the ECJ issued a series of judgments that took a particularly conservative approach to the relationship of European law to international law, stressing the *autonomous* character of the European legal order.[25]

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18. *See id.* at 387.

19. Joined Cases, 21-24/72, Int'l Fruit Co. NV v. Produktschap voor Groenten en Fruit, 1972 E.C.R. 1219, ¶ 4.

20. *Id.*

21. *Id.* ¶ 18.

22. *Id.* ¶ 15.

23. Member Information: The European Union and the WTO, World Trade Org., http://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm (last visited May 16, 2014).

24. Robert Schütze, *On 'Middle Ground': The European Community and Public International Law* 13 (EUI Working Papers Law 2007/13, 2007), *available at* http://cadmus.eui.eu/handle/1814/6817.

25. *See*, *e.g.*, Case C-377/02, Van Parys v. Belgisch Interventie, 2005 E.C.R. I-1465; Case C-308/06, Intertanko v. Sec'y of State for Transp., 2008 E.C.R. I-04057; Case C-188/07, Commune de Mesquer v. Total France SA & Total Int'l Ltd., 2008 E.C.R. I-4501.

For example, in *Commission v. Ireland* (*MOX Plant*),[26] the European Commission raised a complaint against Ireland for having taken the United Kingdom to international arbitration under the United Nations Convention on the Law of the Sea (UNCLOS) concerning the mixed oxide plant located in Sellafield, United Kingdom. UNCLOS provides in article 287 that state parties to the convention may choose among a series of means for the settlement of disputes concerning the interpretation or application of the Convention, including arbitration.[27] The ECJ found that a significant part of the dispute between Ireland and the UK came within the scope of EC competence,[28] and held that the ECJ holds *exclusive jurisdiction* on the matter.[29] The Court based its holding in part on the reasoning that an international agreement "cannot affect . . . the autonomy of the Community legal system."[30] According to this more conservative approach, the autonomy of the European legal order meant that when the Member States transferred certain competences to the EU, these areas of competence became exclusively bound by European law, and the Member States were no longer free to apply other international rules to them as dictated by other international bodies.

The succession doctrine resurged again briefly in 2005 when the Court of First Instance (CFI) of the ECJ addressed the question of the relationship of EU law to the Charter of the United Nations in *Yusuf v. Council and Commission*[31] and *Yassin Abdullah Kadi v. Council and Commission*.[32] In both cases, the CFI found that even though "the Community as such is not directly bound by the Charter of the United Nations,"[33] it is nevertheless "bound by the obligations under the Charter of the United Nations in the same way as its Member States, by virtue of the Treaty establishing it."[34] Citing to *International Fruit*, the court reasoned that by transferring certain powers to the European spheres of competence, "the Member States demonstrated their will to bind it by the obligations entered into by them under the Charter of the United Nations."[35] According to the CFI, the Community thus succeeded to the obligations of its Member States under the United Nations Charter with regard to the powers

26. Case C-459/03, Comm'n v. Ireland, 2006 E.C.R. I-04635, ¶¶ 1, 30.

27. United Nations Convention on the Law of the Sea art. 287, Dec. 10, 1982, 1833 U.N.T.S. 397.

28. Comm'n v. Ireland, 2006 E.C.R. ¶ 120.

29. *Id.* ¶ 136.

30. *Id.* ¶123.

31. Case T-306/01, Ahmed Ali Yusuf & Al Barakaat Int'l Found. v. Council & Comm'n, 2005 ECR II-3533, ¶¶ 232–59.

32. Case T-315/01, Yassin Abdullah Kadi v. Council & Comm'n, 2005 E.C.R. II-3649, ¶¶ 183–208. For a discussion and analysis of the revival of the succession doctrine in the *Yusuf* Court of First Instance judgment, see Schütze, *supra* note 17, at 402–06.

33. *Yusuf*, 2005 E.C.R. ¶ 242; *Kadi*, 2005 E.C.R. ¶ 192.

34. *Yusuf*, 2005 E.C.R. ¶ 243; *Kadi*, 2005 E.C.R. ¶ 193.

35. *Kadi*, 2005 E.C.R. ¶ 200.

and functions that had been transferred by the States to its spheres of competence.

But this revival proved short-lived. Both cases were appealed to the ECJ, and in 2008, the ECJ issued the final judgment in *Kadi*, which is also its current position on the relationship of EU law to international law. The decision contrasts sharply with the positions taken in both CFI decisions,[36] as well as Advocate General Maduro's opinion.[37] The Council Regulation at issue in *Kadi* gave effect to United Nations Security Council Resolutions and imposed restrictive measures against persons and entities associated with various terrorists.[38] In its final judgment, the ECJ annulled the Council Regulation at issue on the ground that it violated fundamental rights of the EU.[39]

In determining the relationship of EU law to United Nations Security Council Resolutions, the ECJ framed its analysis as a matter of Community law and located the debate within the frame of the European legal order:

> The question of the Court's jurisdiction arises in the context of the internal and autonomous legal order of the Community, within whose ambit the contested regulation falls and in which the Court has jurisdiction to review the validity of Community measures in the light of fundamental rights.[40]

The court determined that the United Nations Security Council Regulations do not have "generalised immunity from jurisdiction within the internal legal order of the Community."[41] Rather, the ECJ asserted:

> [T]he review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement.[42]

The court then proceeded to examine the validity of the Council Regulation and found it constituted an unjustified violation of Mr. Kadi's right to property and must be annulled.[43] In so doing, the ECJ affirmed the exclusive jurisdiction of the Court and autonomy of the Community legal

36. *See supra* notes 31–35.

37. *See* Opinion of Advocate General Poiares Maduro, *supra* note 4, at ¶¶ 37–40.

38. Joined Cases C-402/05 P & C-415/05 P, Yassin Abdullah Kadi & Al Barakaat Int'l Found. v. Council & Comm'n, 2008 E.C.R. I-6351 ¶1

39. *Id*. ¶¶ 354–76.

40. *Id*. ¶¶ 316–17.

41. *Id*. ¶ 321.

42. *Id*. ¶ 316.

43. *Id*. ¶¶ 354–76 (annulling the contested regulation, but maintaining its effects for a period of three months in order to allow the Council to remedy the infringements found).

order from international law, including the Charter of the United Nations.[44]

At present the default state of the relationship between EU law and international law is the restrictive approach articulated in *Kadi*, which largely leaves the autonomy of the European legal order intact. In many respects, *Kadi* confirms Martti Koskenniemi's concern about the "marginalization of international law by the ECJ."[45] In the wake of the *MOX Plant* decision, Koskenniemi wrote: "the Court is saying [the European project] enjoys precedence over the international project, European institutions–and their institutional bias–ought to overrule institutions claiming to represent the universal."[46] While it briefly entertained the idea of "functional succession" by the EU to international agreements entered into by the Member States,[47] the ECJ in *Kadi* certainly seems to have set it aside for good.

B. *The European Human Rights Regime*

According to the treaties and ECJ case law, the EU requires respect for human rights[48] in those legal spheres where it has acquired competence. The Charter of Fundamental Rights of the European Union (CFR) enshrines certain rights of EU citizens and residents, such as the freedom of assembly and association (Article 12), or the right to the protection of personal data (Article 8).[49] Article 51 CFR limits the scope of application of the Charter, specifying that its provisions apply to EU institutions and to the Member States "only when they are implementing Union law."[50] The CFR was given full legal effect by the 2007 Treaty of Lisbon, which amended Article 6 of the Treaty on European Union (TEU) to give the CFR the same legal value as the Treaties,[51] and reaffirmed its limited

44. *See Id*. 103, 285, 317.

45. Martti Koskenniemi, International Law: Between Fragmentation and Constitutionalism, ¶ 5 (Nov. 27, 2006), *available at* http://www.helsinki.fi/eci/Publications/Koskenniemi/MCanberra-06c.pdf.

46. *Id.*

47. *Int'l Fruit Co.*, 1972 E.C.R. ¶ 7.

48. I use the term "human rights" here as a proxy for the terminology of "general principles" or "fundamental rights" used in EU treaties or ECJ case law.

49. Charter of Fundamental Rights of the European Union arts. 8, 12, 2010 O.J. (C 83) 2 [hereinafter Charter of Fundamental Rights].

50. *Id.* art. 51(1) ("The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.").

51. Consolidated Version of the Treaty on European Union art. 6, 2010 O.J. (C 83) 1 [hereinafter TEU post-Lisbon] ("[t]he Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.").

scope of application.[52] The institutions of the EU and the Member States (when implementing and interpreting EU law) are thus obligated to respect the rights enumerated in the CFR, and the ECJ monitors the compliance of these acts.[53]

In requiring that EU action respect human rights, it is important to highlight that the EU's role in relation to human rights is also restricted to just that: ensuring respect. The OHCHR has expressed concern about the lack of recognition of *positive* duties in relation to human rights by the EU.[54] By requiring respect, the approach of the European Union is purely *negative*: EU law may not violate human rights standards, but the institutions have no duty to undertake activities that promote and protect human rights.[55] Thus the EU, as an institution implementing and enforcing human rights, is strongly limited by the scope of application of its human rights competences.

The scope of the ECJ's authority to ensure respect for and compliance with human rights in the EU spheres of competence is further limited by the fact that not all types of EU law may be reviewed by the ECJ. As provided in the Treaty on the Functioning of the European Union (TFEU), the ECJ has jurisdiction, *inter alia,* to interpret the Treaties and to determine the validity of and interpret the acts of the institutions, bodies, offices or agencies of the Union.[56] The ECJ may thus review the validity of EU secondary law as to its compliance with EU human rights standards. However, the EU judicial mechanisms do not have the power to invalidate provisions of EU primary law—which consists primarily of the establishing treaties of the EU—leaving these unreviewable with regard to human rights standards.[57]

Regarding the *content* of the rights the EU respects, the EU instruments and ECJ case law have framed these rights as *community law informed by other sources*. When expounding on these other sources, however, the treaties and case law make no explicit reference to interna-

52. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Annex A, art. 1, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

53. *See* TEU post-Lisbon art. 6 (giving the CFR the same legal value as the Treaties) and art. 19 (defining the role of the Court of Justice of the European Union to "ensure that in the interpretation and application of the Treaties the law is observed"); Tawhida Ahmed & Israel de Jesus Butler, *The European Union and Human Rights: An International Law Perspective*, 17 EUR. J. INT'L L. 771, 773 (2006).

54. *See* OHCHR STUDY, *supra* note 8, at 14.

55. *See* TEU post-Lisbon art. 19 (defining the role of the Court of Justice of the European Union); Israel de Jesus Butler & Olivier De Schutter, *Binding the EU to International Human Rights Law*, 27 Y.B. OF EUR. L. 277, 278 (2008).

56. TFEU post-Lisbon arts. 263–64 (actions for annulment), art. 267 (preliminary rulings).

57. *Id.* art. 267. *See also* Paul De Hert & Fisnik Korenica, *The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention of Human Rights*, 13 GER. LAW J. 874, 882–83 (2012).

tional human rights treaties except for the ECHR.[58] Thus, Article 6(3) of the TEU states that the general principles of Union law shall be constituted by "fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States."[59] Similarly, the CFR Preamble states only that the rights in the Charter result from "the constitutional traditions and international obligations common to the Member States . . . the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the [ECJ] and of the [ECHR]."[60] On the scope of guaranteed rights, Article 52 of the CFR provides that insofar as rights contained in the Charter correspond to rights contained in the ECHR, their meaning and scope shall be the same as those in the ECHR.[61]

The EU has recognized that it is bound by international human rights obligations insofar as they are contained in customary international law[62] and any international human rights treaties to which the EU is a party. While some key human rights standards have been recognized to be part of customary international law, such as the prohibition on genocide[63] and freedom from systemic racial discrimination,[64] most have not yet achieved this status. With a few exceptions, the EU is also not a party to the vast panoply of human rights treaties to which its Member States are party. The EU ratified the Convention on the Rights of Persons with Disabilities in 2010,[65] and is currently in negotiations with the Council of Europe for accession to the European Convention on Human Rights.[66] However, as will be discussed in further detail below, these treaties remain limited in

58. In rare cases, the explanatory documents of key legislation makes reference to international human rights treaties, but not as binding authority on the implementation or interpretation of EU law. For example, the explanatory document to the CFR states that Article 24 on the rights of the child "is based on the New York Convention on the Rights of the Child." EXPLANATIONS RELATING TO THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION, at 25, CHARTE 4473/00 (Oct. 11, 2000), *available at* http://www.europarl.europa.eu/charter/pdf/04473_en.pdf.

59. *See* TEU post-Lisbon art. 6(3).

60. Charter of Fundamental Rights, *supra* note 49, pmbl.

61. *Id.* art. 52(3). Article 52 further states that "insofar as this Charter recognizes fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions." *Id.* art.52(4).

62. *See*, *e.g.*, Case C-162/96, A. Racke GmbH&Co. v. Hauptzollamt Mainz, 1998 E.C.R. I-3688, ¶¶ 24, 45–46; Case C-386/08, Brita GmbH v. Hauptzollamt Hamburg-Hafen, 2010 E.C.R. I-01289, ¶¶ 40–42; Case C-308/06, *Intertanko and others v. Sec'y of State for Transp.,* 2008 E.C.R. I-4057, ¶ 51. *See also* OHCHR STUDY, *supra* note 8, at 6.

63. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, ¶ 23 (May 28).

64. Barcelona Traction Light and Power Co. Ltd. (Belg. v. Spain), 1970 I.C.J. 3, ¶ 34 (Feb. 5); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 131 (June 21).

65. *See* Press Release *supra* note 6.

66. *See id.*

scope and are far from covering all the rights that are protected by the international human rights regime.[67]

The EU has defined itself as the supreme and final definer and enforcer of human rights within its spheres of competence. As asserted in *Van Gend & Loos* and affirmed in *Kadi*, the EU also considers itself to have a special status on the global stage, viewing itself as a *new legal order* of international law characterized by autonomy from other bodies of international law. It does not consider itself to be bound by international human rights treaties, such as the ICCPR or ICESCR, which it has not ratified.

II. The Perspective of Public International Law and the Law of Treaties

Public international law and the law of treaties as codified in the Vienna Convention on the Law Treaties (VCLT) developed in large part to accommodate and facilitate a global system that was and remains primarily an inter*nation*al system—in other words, a system whose primary actors are states.[68] With the EU asserting its character as a new kind of legal order different from that of ordinary international treaties and demanding a kind of special or exceptional treatment on the global stage,[69] it was unclear how the EU would and should fit within the rules and framework of the traditional international system. As Advocate General Maduro so colorfully described the issue in his opinion on the *Kadi* case, the risk arose that the EU's legal order and the international legal order might "pass by each other like ships in the night,"[70] with neither truly taking into account or accommodating the other. Public international law and in particular the law of treaties—part of which reflects customary international law[71] and therefore is binding on the EU—provides key guidance on the challenge posed by the EU to the international human rights regime.

It is useful to begin by explaining some of the particularities of international human rights treaties as a subfield of international law. Human rights treaties differ from ordinary treaties in a number of key respects. First, human rights law is "inward-targeted," constraining and limiting the behavior and acts of States within their own territory as opposed to exter-

67. *See infra* notes 102, 171–175.

68. *See* Shaw, *supra* note 2, at 1–11.

69. *See* Magdalena Liková, *European Exceptionalism in International Law*, 19 Eur. J. Int'l L. 463, 463 (2008).

70. *See* Opinion of Advocate General Poiares Maduro, Case C-402/05 P, Yassin Abdullah Kadi v. Council of the Eur. Union and the Comm'n of the Eur. Communities, ¶ 22 (2008).

71. *See*, *e.g.*, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 47 (June 21); Fisheries Jurisdiction Case (Federal Repub. of Ger. v. Ice.), 1973 I.C.J. 49, ¶ 36 (Feb. 2).

nally in their relations with other States.[72] Human rights treaties also embody substantive norms of a universalist character, rather than codify an exchange of rights and benefits as between State parties to the agreement, as would be the case in a bilateral trade agreement. As Rosalind Higgins explains:

> Human rights treaties are not just an exchange of obligations between states where they can agree at will, in a web of bilateral relationships within a multilateral treaty, what bargains they find acceptable. Human rights treaties . . . reflect rights inherent in human beings, not dependent upon grant by the State.[73]

As a result, human rights treaties focus on the protection of the basic rights of individuals, not the reciprocal exchange of rights for the mutual benefit of the contracting states. As such, international human rights treaties may be described as having a kind of *third party*—the individuals themselves.

Because human rights treaties lack much of the reciprocal nature of obligations inherent in other types of agreements, they also lack the underlying incentive structure, which inheres in the reciprocity that undergirds traditional treaties.[74] As a result, the majority of international human rights treaties lack strong enforcement mechanisms, and the implementation and enforcement of international human rights treaties depends significantly on the initiative and goodwill of the contracting parties.[75] The ECHR is an exception to this trend with its own tribunal—the European

72. Bruno Simma & Gleider I. Hernández, *Legal Consequences of an Impermissible Reservation to a Human Rights Treaty: Where Do We Stand?*, *in* THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION, 60, 61 (Enzo Cannizzaro ed., 2011).

73. *See*, *e.g.*, Rosalyn Higgins, *The United Nations: Still a Force for Peace*, 52 MOD. L. REV. 1, 11 (1989).

74. Under an ordinary treaty such as a trade agreement, an impermissible reservation by one party will have a direct negative impact on the other parties' ability to gain the intended benefits from the treaty. Thus, a party has an incentive to object to the reservation and even preclude the entry into force of the treaty as between the two parties in order to protect its interests. If a party objects but does not oppose the entry into force of the treaty between itself and the reserving State, then the provision likewise does not apply as between the opposing State and the reserving State. In such a situation, the reserving state would also suffer the negative effect of its reservation – thereby incentivizing states not to make impermissible reservations to begin with. For further discussion on the dynamics of reciprocity in international treaties, see for example, Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT'L L. 531, 537 (2002). For a more extensive discussion of the role of reciprocity in international treaties see D.W. Grieg, *Reciprocity, Proportionality, and the Law of Treaties*, 34 VA. J. INT'L L. 295, 295 (1994).

75. For a discussion of some of the challenges faced in the enforcement of human rights treaties, see David Gartner, *Transnational Rights Enforcement*, 31 BERKELEY J. INT'L L. 1, 1 (2013); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L. J. 1935 (2002) (explaining the difficulties of enforcing human rights treaties).

Court of Human Rights—mandated to issue binding judgments on state parties.[76]

Numerous debates have arisen about how the law of treaties applies to human rights agreements and how it may accommodate these special characteristics. VCLT Articles 54 to 64 provide rules regarding the termination of and withdrawal from treaties,[77] and the Human Rights Committee of the ICCPR has taken the position that the special characteristics of human rights treaties have implications on the ability of contracting parties to terminate or withdraw from their obligations. The key international human rights treaties, including the international bill of rights trilogy, do not contain any provisions regarding their termination and do not provide for denunciation or withdrawal.[78] According to VCLT Article 56, a treaty containing no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless either (a) the "parties intended to admit the possibility of denunciation or withdrawal[,]" or (b) "a right of denunciation or withdrawal may be implied by the nature of the treaty."[79]

Following a highly controversial attempt by North Korea to withdraw from the ICCPR in August 1997,[80] the Human Rights Committee issued General Comment 26, in which it concluded that the treaty was not capable of denunciation or withdrawal.[81] Applying Article 56 of the VCLT to the ICCPR, the committee found first that "the drafters of the Covenant

76. *See* Convention for the Protection of Human Rights and Fundamental Freedoms art. 46, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR] (on the binding force and execution of judgments).

77. *See* Vienna Convention, *supra* note 1, arts. 54–64 (regarding the termination and suspension of the operation of treaties).

78. *See*, *e.g.*, International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13. However, some human rights treaties do explicitly allow for withdrawal or denunciation. *See*, *e.g.*, the Convention on the Rights of the Child art. 52, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC], stating that "[a] State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations" and the International Convention on the Elimination of All Forms of Racial Discrimination, art. 21, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter ICERD], stating that "[a] State Party may denounce this Convention by written notification to the Secretary-General of the United Nations." Additionally, though some treaties do not provide for termination, they do provide that under certain circumstances, human rights may be temporarily restricted. *See*, *e.g.*, ICCPR, *supra* note 78, art. 4 (on derogation); Office of the High Comm'r for Human Rights, *General Comment No. 29: Article 4: Derogations During a State of Emergency*, U.N. Doc. No. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

79. Vienna Convention, *supra* note 1, art. 56 (denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal).

80. *See* U.N. Treaty Collection, Status of the International Covenant on Civil and Political Rights, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#8 (last visited May 16, 2014).

81. Human Rights Committee, General Comment 26: Continuity of Obligations, ¶¶ 4–5, U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1 (Dec. 8, 1997).

deliberately intended to exclude the possibility of denunciation."[82] The Human Rights Committee then examined the nature of the treaty, and found that:

> [T]he Covenant is not the type of treaty which, by its nature, implies a right of denunciation. Together with the simultaneously prepared and adopted International Covenant on Economic, Social and Cultural Rights, the Covenant codifies in treaty form the universal human rights enshrined in the Universal Declaration of Human Rights, the three instruments together often being referred to as the "International Bill of Rights". As such, the Covenant does not have a temporary character typical of treaties where a right of denunciation is deemed to be admitted, notwithstanding the absence of a specific provision to that effect.[83]

In accordance with the VCLT, the Human Rights Committee concluded that the ICCPR is not capable of denunciation or withdrawal,[84] and—by extension—the other instruments that make up the International Bill of Rights.

The EU has asserted that because it is not a party to the international human rights instruments it is not bound by them and that the EU legal order is autonomous from international law. If so, then in transferring certain powers and functions to the EU spheres of competence, the Member States would effectively be moving them outside the "jurisdiction" of the international human rights treaties. In other words, by transferring their powers, the Member States would effectively be withdrawing certain spheres formerly covered by the human rights treaties to EU spheres of competence, where they are not. This would constitute an invalid denunciation or withdrawal from the treaties in violation of VCLT Article 56.

Article 27 of the VCLT further specifies that a State cannot justify a failure to observe one of its international legal obligations by reference to its domestic legal situation.[85] Under the law of treaties, therefore, EU Member States would not be able to justify a violation of a human rights treaty within the sphere of EU competence on the basis of the asserted special nature of the legal order of the EU or the fact that EU law has supremacy in certain policy areas in a given Member State.

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82. *See id.* ¶ 2.

83. *Id.* ¶ 3.

84. *Id.* ¶ 5.

85. Vienna Convention article 27 explicitly states that a party to a treaty "may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Vienna Convention, *supra* note 1, art. 27 (internal law and observance of treaties). Article 46 further specifies that "a State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent . . ." *Id.* art. 46 (provisions of internal law regarding competence to conclude treaties). For a general discussion of the role of municipal rules in international law, see Shaw, *supra* note 2, at 133–137.

An alternative approach would be to assert that Member States *continue* to be bound by the international human rights treaties despite the transfer of competence. The doctrine of state responsibility provides useful guidance on the question of whether Member States can be held responsible for breaches that occur within the spheres of EU competence where EU law is supreme. State responsibility is a fundamental principle of international law arising out of the doctrines of state sovereignty and equality of states, and which provides that a state incurs responsibility when it commits an internationally unlawful act.[86] Article 8 of the International Law Commission (ILC) Articles on State Responsibility provides that the conduct of a person or group of persons shall be considered an "act of a state" under international law "if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that state in carrying out the conduct."[87] State control is more difficult to prove within the EU context, in particular with the ECJ asserting the supremacy of EU law over municipal law by the EU.

The ECtHR addressed this question in part in its landmark ruling on the 1958 case of *Kahn v. Federal Republic of Germany*, where it held that:

> [I]f a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty, it will be answerable for any resulting breach of its obligations under the earlier treaty[.][88]

Several decades later in the 1998 case of *Matthews v. UK*, the ECtHR explicitly found that Member State responsibility for a violation of the ECHR continues even though the Member State may have transferred competences with regard to those rights to an international organization.[89] However, the holding was limited to EU primary law, which is most comparable to an international agreement independently entered into by the Member States. The picture is less clear with regards to EU secondary law, as will be discussed below. The doctrine of state responsibility thus suggests that the Member States should be held responsible for breaches of the international human rights treaties that might occur in the EU spheres of competence.

A further area of public international law of relevance is the law of state succession to treaties. Broadly put, the law of state succession to treaties is intended to address situations where there has been a change in sovereign authority over a particular territory and to provide rules gov-

86. *See* Shaw, *supra* note 2, at 778.

87. Int'l Law Comm'n [ILC], Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 8, 53d Sess. (2001).

88. X v. Federal Republic of Germany, App. No. 235/56, decision of the Commission of 10 June 1958, 2 Y.B. Eur. Conv. On H.R. 256, 300 (1958).

89. Matthews v. United Kingdom, App. No. 24833/94, Eur. Ct. H.R., ¶¶ 32, 35 (1999), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58910. *See infra* for further discussion of this case.

erning the transfer of participation in international agreements and the continuity of the obligations and rights they prescribe. The special characteristics of human rights treaties are also considered to have implications on the application of the law of succession to treaties.

The Human Rights Committee addressed this issue in its General Comment 26 of 1997, stating that:

> The rights enshrined in the Covenant belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view . . . that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant.[90]

In this view, the rights enumerated in the international human rights covenants attach to the territory, of sorts, and continue to belong to the individuals despite any change in government or authority. A new government or authority would thus succeed automatically to the treaty and the obligation to protect the rights under it would continue.

The question of automatic succession to human rights treaties was also raised with regards to the Genocide Convention in the preliminary objections to the *Application of the Genocide Convention (Bosnia-Herzegovina v. Yugoslavia)* case before the International Court of Justice (ICJ).[91] Although the court ultimately did not make a determination on the question of state succession because it held Bosnia and Herzegovina was clearly a party to the Genocide Convention on the date of the filing of its Application,[92] the issue was addressed in the separate opinions of Judge Shahabuddeen and Judge Weeramantry. Judge Shahabuddeen argued that the question of succession to the Genocide Convention should be resolved through "an approach based on the special characteristics of the [Convention]."[93] In order to give effect to the object and purpose of the Genocide Convention, it "would fall to be construed as implying the expression of a unilateral undertaking by each party to the Convention to treat successor States as continuing as from independence any status which the predecessor State had as a party to the Convention."[94] To find otherwise would inescapably end up resulting in the introduction of "time-gap[s] in protec-

90. *Human Rights Committee*, *supra* note 81, ¶ 4.

91. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. and Herz. v. Yugoslavia), Preliminary Objections, 1996 I.C.J. 595, (July 11).

92. *Id*. at ¶ 23.

93. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. and Herz. v. Yugoslavia), Separate Opinion of Judge Shahabuddeen, 1996 I.C.J. 595, 634 (July 11).

94. *Id.* at 636.

tion," which would be inconsistent with the object and purpose of the Convention.[95]

In his separate opinion, Judge Weeramantry argued that it is "a principle of contemporary international law that there is automatic State succession to so vital a human rights convention as the Genocide Convention."[96] In support of this conclusion, he reasoned:

> If the contention is sound that there is no principle of automatic succession to human rights and humanitarian treaties, the strange situation would result of the people within a State, who enjoy the full benefit of a human rights treaty, such as the [ICCPR], . . . being suddenly deprived of it as though these are special privileges that can be given or withdrawn at the whim or fancy of Governments . . . Such a legal position seems to be altogether untenable, especially at this stage in the development of human rights.[97]

Applied in the EU context, the law of succession to treaties would mean that the EU should automatically succeed to the obligations of the Member States with respect to international human rights treaties in those spheres of competence where EU law is supreme. A failure to do so would result precisely in a gap in protection and the withdrawal of rights at the political whim of a government that Judges Shahabuddeen and Weeramantry argued were untenable.

Despite increasing literature about the law of international organizations, the international legal responsibility of international organizations for violations of international human rights law has remained a contentious topic.[98] The law of state succession to treaties has traditionally applied where the territorial sovereignty of an area is passed from one *state* to another,[99] which is not the case with the EU. Some scholars have suggested that a theory of functional succession should apply to international and regional organizations that have assumed certain functions of their Member States,[100] and that such a theory is needed to address the very real risk that states may attempt to skirt their duties under international

95. *Id.* at 635.

96. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. and Herz. v. Yugoslavia), Separate Opinion of Judge Weeramantry, 1996 I.C.J. 595, 654 (July 11).

97. *Id.* at 649.

98. Robert McCorquodale, *International Organisations and International Human Rights Law: One Giant Leap for Humankind*, *in* INTERNATIONAL LAW AND POWER: PERSPECTIVES ON LEGAL ORDER AND JUSTICE 141, 141 (Kaiyan Homi Kaikobad & Michael Bohlander eds., 2009).

99. *See* Vienna Convention on Succession of States in Respect to Treaties, Aug. 23, 1978, 1946 U.N.T.S. 3. *See also* Shaw, *supra* note 2, at 966–84.

100. *See*, *e.g.*, Noëlle Quénivet, Binding the United Nations to Human Rights Norms by way of the Laws of Treaties, 42 GEO. WASH. INT'L L. REV. 587, 606–08 (2010); Robert Uerpmann, *International Law as an Element of European Constitutional Law: International Supplementary Constitutions* 31–32 (Max Planck Inst. For Comp. Pub. Law and Int'l Law,

law by claiming that another institution is in charge.[101] As discussed above, the ECJ entertained this approach briefly with respect to the GATT in the 1972 *International Fruit* case,[102] but has since rejected it in favor of a more conservative approach articulated in such subsequent cases as *Kadi*. The theory of functional succession has yet to be codified in international treaties or to achieve the status of customary international law. Yet, if the ECJ claims that EU law is supreme in the EU spheres of competence, the theory of functional succession seems the only way to give effect to the object and purpose of the international human rights covenants and ensure no gaps in protection arise.

Despite the special character of human rights treaties and the particularities of the EU regime, an examination of the law of treaties, principle of state responsibility, and the law of succession to treaties reveals that traditional international law does provide key guidance with regards to the challenge posed by the EU to the international human rights regime. Under public international law, the Member States may not denounce or withdraw from the obligations under international human rights treaties. It further suggests, at least as has been interpreted by the ECtHR, that state responsibility continues in spite of any transfer of competences by the Member States to the EU. Another possible solution, though now largely rejected by the ECJ, is the notion that the EU would succeed to the obligations of its Member States under international human rights treaties within the spheres of EU competence.

This Note now turns to examine how two key global actors have addressed the challenges posed by the EU to the international human rights regime.

III. Between *Bosphorus* and *Solange*–The Treatment of the EU by Potential External Judicial Checks

As discussed above, the EU has defined EU law as supreme and the ECJ as the supreme and final authority on human rights within the EU's spheres of competence. This Part will examine how two key actors which could have functioned as judicial checks on the EU with regard to human rights, the Member States and the ECtHR, have responded to the EU's assertion of this authority. Through the *Bosphorus* and *Solange* cases, these two actors have established relationships of extreme deference to the EU with regard to human rights. In so doing, they have in practice made the ECJ the final judicial authority on human rights within the spheres of EU competence. As a result, this Part argues, the EU is currently situated in a lacuna—largely unchecked by existing judicial institu-

Jean Monnet Working Paper 9/03, 2003), *available at* www.jeanmonnetprogram.org/archive/papers/03/030901-02.pdf.

101. *See* Quénivet, *supra* note 100, at 607.

102. Joined Cases 21-24/72, Int'l Fruit Co. NV v. Produktschap voor Groenten en Fruit, 1972 E.C.R. I-1219, ¶ 7.

tions that could have served as vehicles for the application of the international human rights instruments.

A. *The Relationship of the ECtHR to the EU*

In July 2010, official talks began between the Council of Europe and the EU on the EU's accession to the ECHR.[103] While negotiations are still ongoing today, the negotiators took a critical step on April 5, 2013 and finalized a draft accession agreement.[104] According to the Council of Europe, accession will help "close a gap in human rights protection" in the EU by "enhance[ing] consistency between the Strasbourg and Luxembourg human rights systems," and by affording citizens protection against the action of the EU similarly to how they are currently protected against the action of the Member States.[105] Accession is also intended to formalize and institutionalize a special relationship between the EU and the ECHR.

Accession remains to be finalized, however, and until then the ECtHR continues to define its relationship to the EU according to its case law, in particular the seminal 2005 case of *Bosphorus v. Ireland* ("*Bosphorus*").[106] In *Bosphorus*, the ECtHR asserted its authority to review the acts of regional organizations such as the EU and established a standard by which it would review such action: the doctrine of equivalent protection.[107] This doctrine remains the standard of review used by the ECtHR today, and it is expected that the doctrine of equivalent protection or a comparable standard will remain the standard defining the relationship of the ECtHR

103. *EU Accession to the Convention of Human Rights*, COUNCIL OF EUROPE, http://hub.coe.int/what-we-do/human-rights/eu-accession-to-the-convention (last visited May 16, 2014). Protocol No. 14 to the European Convention on Human Rights and Fundamental Freedoms, which entered into force on June 1, 2010, provides the legal basis for the possibility of EU accession to the ECHR. *See* Press Release, Council of Europe, Reform of European Court of Human Rights: Protocol No. 14 Enters into Force, (May 31, 2010), *available at* https://wcd.coe.int/ViewDoc.jsp?id=1628875&Site=DC&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE. Article 6(2) TEU provides the legal basis in EU law for accession, stating that "[t]he Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties." TEU post-Lisbon art. 6(2).

104. The draft accession agreement is currently under review by the Court of Justice of the European Union (CJEU). *See* Press Release, Council of Europe, Milestone Reached in Negotiations on Accession of EU to the European Convention on Human Rights, (Apr. 5, 2013), *available at* https://wcd.coe.int/ViewDoc.jsp?Ref=DC-PR041%282013%29&Language=lanEnglish&Ver=original&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE.

105. Human Rights Europe, *Accession of the European Union to the European Convention on Human Rights*, COUNCIL OF EUROPE, http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession /default_EN.asp? (Nov. 12, 2012).

106. Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland, App. No. 45036/98, 2005-VI Eur. Ct. H.R., (2005), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69564.

107. *See* discussion *infra* pp. 43–51.

to the EU post-accession as well.[108] On its face, *Bosphorus* appears to assert the authority and ability of the ECtHR to function as an external check on the EU's human rights regime. Closer examination of the doctrine of equivalent protection reveals that it instead establishes a standard of extreme deference, which largely amounts to an immunization of the EU from review by the ECtHR.

The ECHR has been ratified by every Member State of the EU.[109] The convention is overseen and enforced by the ECtHR, which can issue binding judgments on state parties in response to applications lodged by individuals, groups of individuals or one or more of the other contracting parties.[110] As discussed above, the EU derives its "general principles" and "fundamental rights" in part from the ECHR.[111] However, it is important to remember that the scope of rights contained in the ECHR is limited, focusing primarily on civil and political rights and including far fewer economic, social and cultural rights than are covered in the key international human rights treaties.[112] With the transfer of competences from the Member States to the EU, the question inevitably arose of whether acts by the EU and its Member States within the EU spheres of competence would also be covered by the ECHR and fall within the jurisdiction of the ECtHR.

The ECtHR found itself in a dilemma. Depending on how it decided the questions of EU and Member State responsibility and the continuity of treaty obligations, the transfer of competences to the EU risked becoming a means for the Member States to skirt their obligations under the ECHR. With over half of the ECHR's contracting parties also Member States of the EU, the expanding scope and depth of EU competence in various policy areas also meant the ECtHR might lose oversight and authority over a significant portion of its legal sphere. The significance and roles of the ECHR and ECtHR were at risk. Perhaps most critically, the EU's new kind of legal order seemed to be creating a legal sphere of significant size which would not be bound by external human rights instruments and judicial mechanisms for controlling and ensuring the protection of human rights.

The ECtHR attempted to address this dilemma in part in the 1999 case of *Matthews v. UK* ("*Matthews*"), where it examined the question of the continuity of Member State obligations with regards to EU primary

108. *See* De Hert & Korenica, *supra* note 57, at 889–95.

109. Member States of the Council of Europe, as of May 16, 2014, COUNCIL OF EUROPE, http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG (last visited May 16, 2014).

110. *See* ECHR, *supra* note 76, art. 46.

111. *See supra* pp. 8–9 for a discussion of the source of the EU's "general principles."

112. *See* OHCHR STUDY, *supra* note 8, at 11. *See also*, *e.g.*, EUROPEAN COURT OF HUMAN RIGHTS, CULTURAL RIGHTS IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS, RESEARCH DIVISION OF THE EUROPEAN COURT OF HUMAN RIGHTS, (2011), *available at* http://www.echr.coe.int/NR/rdonlyres/F8123ACC-5A5A-4802-86BE-8CDA93FE58DF/0/RAPPORT_RECHERCHE_Droits_culturels_EN.pdf.

law.[113] EU primary law, as explained above, cannot be reviewed by the ECJ as to its conformity with human rights standards, because the EU judicial mechanisms do not have the power to invalidate provisions of EU primary law.[114] In *Matthews*, the ECtHR was asked to review whether a piece of EU primary legislation, the European Community Act on Direct Elections of 1976 ("1976 Act") was in violation of the right to free elections as protected by Article 3 of Protocol No. 1 of the ECHR.[115] The applicant was a British citizen and resident of Gibraltar who claimed that her right to free elections under the ECHR had been violated when the UK informed her that the 1976 Act did not extend the right to vote in European Assembly elections to residents of Gibraltar.[116] Even though Gibraltar was bound by EU laws, had implemented EU legislation fully and promptly, and Gibraltarians were EU citizens, Gibraltarians and other EU citizens living in Gibraltar were not allowed to vote in the European Assembly elections.[117]

The ECtHR ultimately found that Matthews' right to free elections as guaranteed by Article 3 of Protocol No. 1 had been violated.[118] In the opinion, the ECtHR also addressed the deeper question of whether a Member State could be held responsible for a breach of the ECHR by a provision of EU primary law, even though the acts of the European Community as such could not be challenged before the ECtHR because the EU was not a contracting party.[119] The U.K. argued, *inter alia,* that its responsibility could not be engaged because it did not have the power of effective control over the act complained of.[120] Nevertheless, the ECtHR found that the U.K. could be held responsible, and that the responsibility of the U.K. for violations of the ECHR "continues" even after the U.K. has transferred certain competences to the EU level.[121]

> The Court observes that acts of the EC as such cannot be challenged before the Court because the EC is not a contracting party. The Convention does not exclude the transfer of competences to international organizations provided that Convention rights continue to be "secured."[122] Member States' responsibility therefore continues even after such a transfer.[123]

Thus, according to the ECtHR, the Member States remained bound by their obligations under the ECHR regardless of the transfer of compe-

113. Matthews, App. No. 24833/94 Eur. Ct. H.R. (1999).

114. *See supra* note 56.

115. Matthews, at ¶¶ 7, 24.

116. *Id.* ¶¶ 14, 20, 61, 64.

117. *Id.* ¶¶ 7–19.

118. *Id.* ¶ 65.

119. *Id.* ¶ 32.

120. *Id.* ¶ 26.

121. *Id.* ¶ 32.

122. *Id.* ¶ 32.

123. *Id.*

tence to the European level within the EU and independent of any claims to the contrary by the ECJ on the basis of the supremacy of EU law.

The ECtHR's finding on the continuity of Member State responsibility, however, is limited to EU primary law. In support of its finding, the ECtHR explained that the 1976 Act, like the Maastricht Treaty, is an international instrument freely entered into by the U.K. and the other Member States.[124] The ECtHR stressed the fact that the 1976 Act was EU primary law, highlighting how "the 1976 Act cannot be challenged before the [ECJ] for the very reason that it is not a 'normal' act of the Community, but is a treaty within the Community legal order."[125] As such, the U.K. was "responsible *ratione materiae* . . . for the consequences of that Treaty."[126] Through this reasoning, the ECtHR took a key step toward resolving the problem of potential gaps in ECHR coverage within the EU legal order, but it limited its holding to EU primary law.

In 2005, the ECtHR had an opportunity to examine whether the doctrine of equivalent protection might also apply to EU secondary law in *Bosphorus*. EU secondary law includes, *inter alia*, unilateral acts such as regulations, directives, decisions, opinions, and recommendations.[127] In *Bosphorus*, the ECtHR was asked to review an application brought by Bosphorus Airways alleging that EC Council Regulation 990/93 implementing UN Security Council Resolution 820 (1993) was in violation of the ECHR and breached its rights under Article 1 of Protocol No. 1 (protection of property and peaceful enjoyment of possessions).[128] The ECtHR ultimately held that the impoundment of the Bosphorus Airways aircraft by Ireland did not give rise to a violation of the ECHR.[129] In arriving at this holding, however, the court addressed the critical question of whether it had the authority to review acts of the EU, even though the EU is not formally bound by the ECHR.

As mentioned above, the establishment of EU legal spheres of competence and supremacy raised the possibility that such spheres might not be covered by the ECHR because the EU was not a party to the treaty. This in turn would create gaps in Convention coverage in Europe. The ECtHR expressed this concern explicitly in *Bosphorus,* when it recognized that "absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer [of competence] would be incompatible with the purpose and object of the Convention."[130] And in-

124. *Id.* ¶ 33.

125. *Id.*

126. *Id.*

127. See TFEU art. 288. EU secondary law also includes a number of other sources, such as communications and recommendations, white and green papers, and various Conventions and Agreements.

128. Bosphorus Hava Yollari Turizm ve Ticaret Anoim Sirketi v. Ireland, App. No. 45036/98, Eur. Ct.H.R. ¶¶ 3, 16 (2005), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69564.

129. *Id.* ¶ 167.

130. *Id.* ¶ 154.

deed, treating the spheres of EU competence as falling outside the ambit of the ECHR, would create a situation where, in the words of the court, "the guarantees of the Convention could be limited or excluded at will, thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards."[131]

By accepting the case, the ECtHR showed its willingness to engage with applications claiming that EU law is in violation of the ECHR. As explained by Paul De Hert and Fisnik Korenica, this acceptance in itself demonstrated that the ECtHR felt it had the authority to review the acts of regional organizations that are not formally a party to the ECHR.[132] The ECtHR began by recognizing the supremacy of EU law in certain areas and that EU law is binding on the Member States.[133] It then found that the interference with human rights at issue in the case was "not the result of an exercise of discretion by the Irish authorities, either under Community or Irish law, but rather amounted to compliance by the Irish State with its legal obligations flowing from Community law" (here, Article 8 of Regulation (EEC) no. 990/93).[134] In so doing, the ECtHR thereby framed the case as its reviewing of an act of the EU, even though it was ultimately implemented by a Member State.

While on the one hand asserting its authority to review the compliance of EU acts, the ECtHR also continued to maintain the position that it could only hold the Member States—and not the EU—responsible for any violations. The ECtHR recognized that contracting parties could transfer sovereign power to an international organization, yet it continued to find that the holder of the transferred sovereign power (here the EU) "is not itself held responsible under the Convention for proceedings before, or decisions of, its organs as long as it is not a Contracting Party."[135] Rather, it is the contracting party, which is responsible for all the acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations.[136]

Thus, at least superficially, the ECtHR seems to have articulated a legal paradigm that would ensure there are no gaps in its coverage within Europe due to EU spheres of competency. While the court could not hold the EU itself responsible, it would nevertheless be able to review EU acts (i.e. secondary law) via the theory of the continuing responsibility of the contracting parties as implementers of binding EU law. Thus, at least on a superficial level, this set-up appears to address the problem of potential gaps in ECHR coverage. This Note now turns to address the *standard* the

131. *Id.*

132. De Hert & Korenica, *supra* note 57, at 881.

133. *See*, *e.g.*, Bosphorus, App. No. 45036/98, Eur. Ct. ¶¶ 92, 95, 147.

134. *Id.* ¶ 148.

135. *Id.* ¶ 152.

136. *Id.* ¶ 153.

ECtHR established to review the compliance of EU acts: the doctrine of equivalent protection.

In *Bosphorus*, the ECtHR established the doctrine of equivalent protection as the standard by which it would review EU secondary law. In essence, the doctrine creates a rebuttable presumption that an interference with a right by EU secondary law is justified. The doctrine of equivalent protection differs from the standard of deference the ECtHR applies to the contracting states, known as the "margin of appreciation doctrine," and according to which the law accords a certain margin of discretion or 'room for manoeuvre' to public authorities.[137] Over the years, the margin of appreciation doctrine has developed into a complex standard, tailored to take into account the specificities of the issues raised in a given case and the particular human rights system of the country at hand.[138] While this Note will not engage in a detailed analysis of the margin of appreciation doctrine here, suffice it to say that it constitutes a more restrictive standard of deference than that created by the ECtHR in *Bosphorus* for the EU. The doctrine of equivalent protection, this Note argues, functions largely to immunize EU acts from review by the ECtHR.

The doctrine of equivalent protection was created to accommodate what the ECtHR identified as a legitimate general-interest of compliance with Community law by a contracting party.[139]

The Court has long recognized the growing importance of international cooperation and of the consequent need to secure the proper functioning of international organizations.[140]

The court thus developed the doctrine of equivalent protection because it felt "international cooperation" was an interest worth protecting in itself, and an interest that was important enough to justify an interference with a right protected by the ECHR.[141] In other words, the margin of deference accorded under the doctrine essentially reflects the weight assigned by the Court to this general interest.

According to the doctrine of equivalent protection, an interference with a right is presumed to be proportionate if the regional organization in question (here the EU) disposes of a system of "equivalent" or "comparable" protection of human rights obligations derived from the ECHR.[142] The interference is considered justified

137. For a thorough discussion of the margin of appreciation doctrine, see, for example, Giulio Itzcovich, *One, None and One Hundred Thousand Margins of Appreciations: The* Lautsi *Case*, 13 Hum. Rts. L. Rev. 287, 292 (2013). *See also*, Yutaka Arai-Takahashi, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR (2002) (analyzing the case-law of the ECHR with respect to the margin of appreciation); Michael Hutchinson, *The Margin of Appreciation Doctrine in the European Court of Human Rights*, 48 Int'l & Comp. L. Q. 638 (1999).

138. *See* Itzcovich, *supra* note 137, at 292–97.

139. Bosphorus, App. No. 45036/98, Eur. Ct. H.R., ¶ 150.

140. *Id.*

141. *Id.* ¶ 155.

142. *Id.*

> as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides . . .[143]

If such equivalent protection is considered to be provided by the organization, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organization.[144]

Even if the system is found to be equivalent, however, the presumption may be rebutted if there is evidence that the protection afforded was "manifestly deficient."[145] Thus, only in the case of *manifest deficiency* would the ECtHR consider the general interest of compliance with EU law to be outweighed.[146] In other words, if the protection was deficient—but just not *manifestly* so—the general interest in compliance with Community law would outweigh the interference with an individual's right at issue.

This framing of the standard is problematic and raises concerns with regards to the protection of human rights in Europe. In essence, the ECtHR is saying that it is willing to cede its role as external check on potential human rights violations in the spheres of EU competence, so long as the EU's human rights system is not manifestly deficient. The equivalent protection doctrine creates a sphere within the EU legal order, which the ECtHR will not touch. If the equivalent protection doctrine standard is met, the ECtHR explains, then the general-interest in compliance with the law of a regional organization will outweigh what it refers to as "the [ECHR]'s role as a 'constitutional instrument of European public order' in the field of human rights."[147] Under the veil of this seemingly innocuous language, however, the Court is in fact saying that it is willing to sacrifice its oversight and review of certain violations of human rights so long as the overall EU human rights system is not manifestly deficient. There is no doubt, within this view, that the equivalent protection doctrine creates a significant lacuna within the European legal sphere where human rights violations may occur without the external check of the ECHR.

The ECtHR then proceeds to apply the equivalent protection doctrine to the case at hand, but does so in a superficial and less than rigorous manner which almost suggests a precocious presumption of equivalence and compliance. The ECtHR first finds that the protection of fundamental rights by Community law can be considered to be *equivalent* to that of the Convention system.[148] Following a cursory examination of the EU Trea-

143. *Id.*
144. *Id.* ¶ 156.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* ¶ 165.

ties and passing reference to ECJ case law (which it does not examine in depth or detail), the ECtHR concludes that sufficient substantive guarantees are in place.[149] The Court then examines the mechanisms of control in place to ensure the observance of these guarantees, and determines that these are likewise adequate.[150] Without examining in any fastidious manner the actual application of these mechanisms, the record of judicial review or the quality of the application of the guarantees, the ECtHR then concludes that the mechanisms are also up to par because actions can be initiated before the ECJ and the ECJ maintains its control on the application by national courts of Community law.[151]

Although the ECtHR in *Bosphorus* examines both the substantive guarantees afforded by EU law and the mechanisms in place to ensure their observance, it does not inquire into the actual application of these mechanisms or the ECJ's interpretations and definition of the different human rights. Surely individual countries such as the Germany, France or even Russia would pass so cursory a test—yet the ECtHR has not accorded them the same level of deference as it accords the EU via the equivalent protection doctrine.

Although the EU is a regional and in certain respects a supranational organization, the ECJ's authority with regard to human rights applies to those spheres of competence where EU law is supreme. In those spheres of competence, the EU has final and binding authority—acting in a state-like capacity comparable to that exercised by other contracting states within their national legal orders. It is unclear why the ECtHR does not feel a more rigorous and deep analysis of the EU system is warranted, and the Court fails to provide any justification for this underlying assumption and consequent special treatment of the EU.

A further weakness in the doctrine is the lack of clarity surrounding when and how frequently the equivalence test will be applied. The Court specifies that "any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection."[152] However, the ECtHR does not specify how often or under what circumstances such a revision of its finding of equivalent protection might occur. Assuming the ECtHR's analysis of the equivalence of the EU human rights system is correct, one can easily imagine a situation where the system begins to fall apart, or the ECJ interprets or applies certain rights in contravention of the ECHR—but the ECtHR fails to re-examine the question of equivalence and thus does not ensure rectification of the violation. In any case, the equivalence test reveals a strong and unjustified deference to the EU.

After finding that the presumption applies to the EU, the ECtHR turns next to examine whether it may nevertheless be rebutted in the case

149. *Id.* ¶ 159.

150. *Id.* ¶¶ 163–65.

151. *Id.* ¶¶ 163–64.

152. *Id.* ¶ 155.

at hand through a showing of "manifest deficiency." The Court's analysis here is also sparse and suggests a further problematically superficial test for determining manifest deficiency. The Court mentions having regard to the nature of the interference, the general interest pursued by the impoundment of the aircraft, the sanctions regime and the ruling of the ECJ.[153] It then finds, unsupported by analysis, that there has been "no dysfunction of the mechanisms of control of the observance of Convention rights" and concludes that the protection of the applicant company's Convention rights was not manifestly deficient.[154]

While the ECtHR's analysis and support for its finding of no manifest deficiency is sparse, it suggests that the ECtHR will base its determination significantly, if not solely, on an inquiry into whether the existing mechanisms of control have dysfunctioned in the particular case at hand. Again here, the ECtHR limits its review to a superficial consideration of the control mechanisms in the EU, rather than a substantive inquiry into the application and interpretation of human rights—which would seem a more appropriate point of departure when the potential violation of human rights are at stake. As with its application of the equivalence test, the ECtHR's determination of manifest deficiency also seems to be based on the very presumption of compliance it is meant to be assessing.

An analysis of *Matthews* and *Bosphorus* has revealed that the legal sphere covered by the ECHR and the ECtHR in Europe is one marked by a lacuna with regards to the EU. In *Matthews*, the ECtHR found that it can review the conformity of EU primary law with the ECHR on the basis of the continued responsibility of the Member States despite the transfer of competences to the EU, but this holding was limited to EU primary law.[155] In *Bosphorus*, the ECtHR found that it could review the compliance of EU secondary law, but created a special standard, the doctrine of equivalent protection, which essentially immunizes a significant legal sphere within the EU from review by the ECtHR. Although the doctrine of equivalent protection formally recognized and created a legal basis for the ECtHR to review EU secondary law, the equivalence and manifest deficiency elements of the standard grants significant deference to the EU and ECJ, thereby also formally limiting the extent to which the ECtHR can function as an external judicial check on the EU human rights regime.

Paul de Hert and Fisnik Korenica have raised the argument that the ECtHR developed the doctrine of equivalent protection "because of the fear that the Luxembourg Court would refuse to accept a ruling of the Strasbourg Court."[156] The language of the opinions suggests that the ECtHR attempted to engage with and accommodate the EU in order to avoid gaps in coverage and to mitigate the ability of the contracting parties to skirt their international obligations under the ECHR through the trans-

153. *Id.* ¶ 166.

154. *Id.*

155. De Hert & Korenica, *supra* note 57, at 883.

156. *Id.* at 880.

fer of competences to the EU level. Whatever its reasons and motivations, the ECtHR has also created a significant lacuna in its coverage. As a result, significant spheres of EU competence, including its human rights regime, have arisen outside the grasp of the external judicial check and control which the ECtHR could have provided.

B. *The Relationship of the Member States to the EU*

I turn now to examine the second actor on the global stage which had the potential to function as an external judicial check on the EU human rights regime: the Member States themselves. As discussed above, the Member States are of particular interest because they are bound by the broad spectrum of international human rights treaties. Thus, unlike the ECtHR, which is confined to applying and enforcing the more limited scope of rights guaranteed in the ECHR, the provision of an external judicial check by the Member States held the potential of ensuring that the full panoply of human rights instruments and law might bind the EU indirectly via the Member States themselves. Again here, however, the Member States have established a relationship of extreme deference to the EU human rights regime, allowing the EU to emerge largely unchecked by external judicial mechanisms.

The Member States have taken different approaches to accommodating or incorporating the principle of the supremacy of EU law first asserted by the ECJ in *Costa v. ENEL*. These approaches reflect the different constitutional traditions of the Member States as well as the different ways they each define the relationship between international and municipal law. For purposes of my analysis here, I will focus on the approach taken by Germany and the *Bundesverfassungsgericht*, the Federal Constitutional Court of Germany, in the critical 1986 *Solange II* case. Germany provides an ideal prism through which to examine this relationship, both because Germany is considered to have one of the least deferential standards of the Member States and because the *Bundesverfassungsgericht* has become in many respects the locus for negotiating the limits of the supremacy of the EU with respect to fundamental rights.

Germany has adopted a dualist-like approach to defining the relationship of municipal law, including the German Constitution, or German Basic Law, to Community law. Generally, this means that the German courts have derived the binding force of Community law from the German constitutional principle of observance of international law in good faith rather than from the distinctive nature of the Community legal order and its autonomy.[157] In other words, the municipal courts have rejected the hierarchy of legal acts asserted by the ECJ, whereby the acts of national law, including the Constitution, are subject to the unconditional supremacy of EU law.[158]

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157. Roman Kwiecién, *The Primacy of European Union Law over National Law Under the Constitutional Treaty*, 6 GERMAN L. J. 1479, 1488 (2005).

158. *Id.*

Germany defined the exact character of the relationship of German municipal law to EU law in large part in the *Solange* saga. The story began with the 1970 ECJ case of *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide*. The case involved a possible conflict between EC regulations and the German Constitution. The applicant in the case argued that the EC regulation at issue should be invalidated due to its conflict with the German Constitution. The ECJ held that not even a fundamental principle of municipal constitutional law could be invoked to challenge the supremacy of directly applicable Community law, stating, "the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of its constitutional structure."[159] The ECJ thereby sought to create and assert its primacy over all municipal law, including national Constitutions and national interpretations of fundamental principles.

Germany responded to this assertion of supremacy and authority a few years later in the 1974 case of *Internationale Handelsgesellschaft von Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (*Solange I*) before the *Bundesverfassungsgericht, the Federal Constitutional Court of Germany*. While the Court had generally accepted the supremacy of Community law in previous cases regarding various types of law, it was more hesitant with the question of whether Community law could take primacy over the inalienable fundamental rights contained in the German Basic Law. The Court was especially concerned with avoiding a situation where the supremacy of EU law might result in gaps in protection for German citizens, such as might occur where national constitutions give stronger guarantees of rights for their citizens than does the Community:[160]

> In so far as citizens of [Germany] have a claim to judicial protection of their fundamental rights guaranteed in the Basic Law, their status cannot suffer any impairment merely because they are directly affected by legal acts . . . which are based on Community law. Otherwise, a perceptible gap in judicial protection might arise precisely for the most elementary status rights of the citizen.[161]

The Court held that in light of the present state of evolution of the EU, it would not renounce its right to uphold German fundamental rights in the face of a conflict with Community law.[162] The *Bundesverfassungsgericht* stated its particular concern with the following deficiencies in the

159. Case 11/70, Int'l Handelsgesellschaft v. Einfuhr- und Vorratsstelle Getreide, 1970 E.C.R. 1125, 1134.

160. Bundesverfassungsgerich [BVerfGE] [Federal Constitutional Court] May 29, 1974, ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 37, 271 CMLR 540, ¶ 6 (Ger.), *translated in* THE INSTITUTE FOR TRANSNATIONAL LAW: FOREIGN LAW TRANSLATIONS (1974), *available at* http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=588.

161. *Id.*

162. *Id.* ¶ 4.

European Community: (a) the lack of a democratically elected parliament directly elected by general suffrage and to which the Community organs empowered to legislate are fully responsible on a political level, and (b) the lack of a codified catalogue of fundamental rights.[163] Through the decision, the Court impliedly rejected the principle of the supremacy of EU law, at least with regards to the delineation and interpretation of fundamental rights.

In light of the ECJ's further development of a doctrine of fundamental rights in subsequent cases, the *Bundesverfassungsgericht* modified its approach in the 1986 case *Re Wünsche Handelsgesellschaft* (*Solange II*). In the decision, the Court held:

> In view of those developments it must be held that, *so long as* the European Communities, in particular European Court case law, *generally ensure effective protection* of fundamental rights as against the sovereign powers of the Communities which is to be regarded as *substantially similar* to the protection of fundamental rights required unconditionally by the Basic Law, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Basic Law; references to the Court under Article 100 (1) for that purpose are therefore inadmissible.[164]

Thus, in *Solange II,* the Court established a standard, whereby *so long as* the ECJ had a level of protection of fundamental rights substantially in concurrence with the protections afforded by the German Constitution they would no longer review specific Union acts in light of their own constitution.

The *Solange II* principle established a highly deferential standard for review of EU law by the *Bundesverfassungsgericht*. The Court concluded that the European Communities met the standard of generally ensuring effective protection in a manner substantially similar to that required by German Basic Law.[165] On the basis of its finding of substantial similarity, the *Bundesverfassungsgericht* declared that it would no longer review secondary EU law according to its municipal standards for fundamental rights. Although the opinion technically leaves open the possibility that

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163. *Id.*

164. Bundesverfassungsgerich [BVerfGE] [Federal Constitutional Court] Oct. 22, 1986, 1987 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 73, 339 (Ger.),3 CMLR 225, para. f, *translated in* THE INSTITUTE FOR TRANSNATIONAL LAW: FOREIGN LAW TRANSACTIONS (1974), *available at* http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=572 (emphasis added).

165. *Id*. paras. d–e.

Germany might someday decide that the EU human rights system does not in fact ensure effective protection in a manner substantially similar to that required by German Basic Law, it did not specify when and how this standard would be reviewed. In so doing, the Court formally limited both its own scope of authority and that of municipal law to function as an external check on EU law and the EU human rights regime.

The parallels between the approach of the ECtHR and the *Bundesverfassungsgericht* in *Solange II* are striking. In fact, *Solange II* served as a model for the doctrine of equivalent protection created by the ECtHR.[166] In comparison, the *Solange II* standard is arguably still more deferential than that of the ECtHR. In contrast to the doctrine of equivalent protection, which allows for the presumption of EU compliance to be rebutted through a showing of manifest deficiency (no matter how arguably inadequate the standard), the *Bundesverfassungsgericht* has extricated itself entirely from any authority to conduct a review of EU acts and law on the basis of external principles *so long as* the EU system is "substantially similar" to its own. In so doing, it also eradicated the possibility that the Member States could have functioned as an external check on the EU definition of rights.

As the Member States have ratified and are bound by most international human rights treaties, occupying the role of external check would have enabled Member States to rectify or refuse to implement EU acts and law which were in violation of the international human rights treaties. In refusing to review EU secondary law on the basis of municipal (external) standards, the Member States have closed off this possibility. This in turn has effectively allowed a significant legal sphere within the EU, including the EU human rights regime, to arise unchecked by the international human rights regime (as applied by the Member States).

In conclusion, this Part has examined how two key actors who could have functioned as external judicial checks on the EU human rights regime, the ECtHR and the Member States, have responded to the EU's assertion of primacy and supremacy in this area. A close examination of the *Bosphorus* and *Solange II* standards reveals a legal landscape where the EU arises largely unchecked by external human rights standards. Both actors appear to have affirmed the EU's self-definition as final judicial authority on human rights within the spheres of EU competence, thereby allowing a lacuna to form in the international human rights regime.

IV. Despite the Lacuna, is the EU Ensuring Compliance of Its Own Accord?

As examined previously, and as reflected in the EU instruments and ECJ case law, the EU does not consider itself bound directly by the international human rights instruments. Due to the standards of extreme deference established by the ECtHR and Member States, the EU in practice emerges as the final judicial authority on human rights within the legal

166. De Hert & Korenica, *supra* note 57, at 878.

spheres of EU competence. Within this frame, the EU unquestionably sits in a lacuna in the international human rights regime. In spite of this gap and despite the EU's explicit rejection of any binding authority of these treaties, this Note turn now to address a further question. Does the EU nevertheless engage with or attempt compliance with the international human rights treaties in its delineation and definition of human rights of its own accord? The picture is discouraging and further reinforces the concern that the EU is emerging as a legal sphere outside the international human rights regime.

First, the EU's use of and reference to international human rights instruments when delineating and interpreting rights has been sporadic and inconsistent at best. As discussed previously, the EU treaties and the CFR make no explicit reference to international human rights instruments. One minor exception to this is Article 18 of the CFR on the right to asylum, which makes reference to the Convention relating to the Status of Refugees, stating that the right to asylum shall be guaranteed "with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees . . ."[167] No comparable reference is made to the fundamental human rights treaties such as the ICCPR and ICESCR.

The lack of reference to the key international human rights instruments is not for lack of trying and advocacy by the monitoring bodies of the treaties. During the drafting process of the CFR, the Committee on Economic, Social and Cultural Rights even issued a statement to the Convention to draft a Charter of Fundamental Rights of the European Union, expressing its concerns about the lack of explicit reference to the international treaties.[168]

Furthermore, the Committee, while noting that in the explanatory notes to each draft article on economic and social rights ample reference to the European law sources is provided, no reference to the relevant economic and social rights' obligations existing under the International Bill of Human Rights, i.e. under the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. The Committee in this connection welcomes draft amendments proposed by delegates to the Convention making express reference to such treaty obligations.[169] This concern, however, was not heeded.

The case law of the ECJ has proven no more fruitful, again in spite of efforts by the monitoring bodies of the treaties and the OHCHR to engage with the court and parties. On several occasions, the Human Rights Committee of the ICCPR has put itself before the ECJ as a source of inspira-

167. Charter of Fundamental Rights, *supra* note 49, art. 18.

168. Comm. On Econ., Soc., and Cultural Rights, Statement of the Committee on Economic, Social and Cultural Rights to the Convention to draft a Charter of Fundamental Rights of the European Union, ¶ 6, *available at* www2.ohchr.org/english/bodies/cescr/docs/statements/EU.doc (last visited May 16, 2014).

169. *Id.*

tion for recognizing a general principle on several occasions.[170] Israel de Jesus Butler and Olivier De Schutter explain how while the ECJ has at times superficially recognized the significance of the ICCPR, stating "it has not been possible to find a case where [the ECJ] has actually relied upon its provisions."[171] This is concerning as the ECJ could easily consult and refer to the HRC and ICCPR, even if only as persuasive authority.

In some instances, the ECJ has even overtly dismissed the relevance and authority of the Human Rights Committee. In the 1998 ECJ case of *Grant v. South West Trains,* the ECJ explicitly dismissed and ruled contrary to an Advisory Opinion of the Human Rights Committee.[172] The case addressed the question of whether discrimination on the basis of sex included discrimination based on the employee's sexual orientation.[173] The applicant, Ms. Grant, was employed by South West Trains, and her employment contract granted travel concessions to her "spouse and depend[a]nts."[174] Ms. Grant applied for the concessions for her female partner, but South West Trains refused to grant them on grounds that unmarried persons were only entitled to concessions if their partner was of the opposite sex.[175]

The ECJ held that discrimination on the basis of sex did not include sexual orientation.[176] However, it did so in explicit disregard of the Advisory Opinion of the Human Rights Committee of the ICCPR, which had advised that "sex . . . is to be taken as including sexual orientation."[177] Although the ECJ did make reference to the Advisory Opinion in the judgment, it did not engage with it or accord it any, even persuasive, weight. The ECJ justified its disregard of the Advisory Opinion on the grounds that the Human Rights Committee is "not a judicial institution and [its] findings have no binding force in law."[178] Interestingly, the holding in *South West Trains* would later be rendered null by the adoption of the Employment Equality Directive in 2000, prohibiting discrimination on the basis of sexual orientation.[179]

It is true that the Human Rights Committee's opinion was not binding on the ECJ, as the EU was not a party to the ICCPR and the Committee's interpretation of the meaning of "discrimination on the basis of sex" had not yet achieved the status of customary international law. Nevertheless, it is concerning that the ECJ accorded it no authority whatsoever and dis-

170. Butler, *supra* note 55, at 282.

171. *See id*.

172. Case C-249/, Grant v South West Trains Ltd, 1998 E.C.R. I-621.

173. *Id*. ¶¶ 24–37.

174. *Id.* ¶¶ 3–4.

175. *Id.* ¶¶ 7–8.

176. *Id.* ¶ 50.

177. *Id.* ¶ 46.

178. *Id.*

179. European Union Agency for Fundamental Rights, Handbook on European Non-Discrimination Law, 14 (2010), *available at* http://www.echr.coe.int/Documents/Handbook_non_discri_law_ENG_01.pdf.

missed it with a seeming slight of the hand. Of further concern, is the fact that the United Kingdom (the country of nationality of South West Trains) opted to follow the interpretation of the ECJ over that of the Human Rights Committee.

The case reveals a two-pronged problem. On the one hand, the ECJ chose to delineate and interpret rights within its spheres of competence in a way that was knowingly and explicitly contrary to the position taken by the Human Rights Committee. On the other hand, the U.K., which has ratified and is bound by the ICCPR,[180] chose to comply with the ECJ's interpretation, rather than with the Advisory Opinion of the ICCPR. The case illustrates the way in which the ECJ's disregard for international human rights law and instruments challenges the international human rights regime as a whole. While it may not have been the intent of the U.K. with regard to this case, *South West Trains* reveals the very real risk that Member States may use the transfer of competences to the EU as a means of skirting their responsibilities under international human rights law.

It also reveals that the EU may function as a pull factor, inducing Member States not to comply with their obligations under international human rights instruments. The OHCHR expressed its concern that a two-tiered system of protection may develop in the EU between those areas covered by national law and those falling within the competence of the EU:

> There are numerous areas of EU law where potential for conflict arises between the obligations incurred under [ ] human rights treaties and obligations deriving from EU law. Member States may elect to give priority to their obligations under EU law, which the EU doctrine of supremacy obliges them to do.[181]

Within the frame of *South West Trains*, compliance with the ECJ meant refusing to comply with the Human Rights Committee's Advisory Opinion—and the U.K. chose compliance with the ECJ. With no formal judicial body and weak enforcement mechanisms, the international human rights instruments have little chance of exerting any comparable form of pressure on the Member States to ensure compliance.

A further area where the EU has manifested its disregard for international human rights instruments relates to the *scope* of the rights included in the EU human rights regime. As discussed above, the EU derives its "general principles" from the ECHR and the constitutional traditions of the Member States. However, international human rights treaties cover a far wider range of economic, social and cultural rights than the ECHR,

180. ICCPR Status of Ratifications, UNITED NATIONS TREATY COLLECTION, *available at* https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-4&chapter=4&lang=en (last updated Mar. 14, 2014).

181. OHCHR STUDY, *supra* note 8, at 6, 21.

which focuses primarily on civil and political rights.[182] A number of international human rights treaties, such as the Convention on the Rights of the Child,[183] also recognize rights in far greater detail and depth than the ECHR.[184] In a 2012 report, the OHCHR expressed its concern that "[t]o the extent that EU Law fails to recognise and reflect the greater scope and depth of Member States' obligations as they exist in the [ ] human rights treaties, individuals within EU territory face a denial of their basic rights."[185]

At the time of the drafting of the CFR, the Committee on Economic, Social and Cultural Rights had also expressed concern about the scope of rights covered by the draft CFR. The Committee was worried that a failure to integrate economic and social rights on an equal footing with civil and political rights would amount to a violation by the Member States of the obligation under Article 2(1) of the Covenant to "achiev[e] progressively the full realization of the rights recognized"[186] in the Covenant.[187] A failure to integrate economic and social rights would send "negative regional signals [that] would be highly detrimental to the full realization of all human rights at both the international and domestic levels, and would have to be regarded as a retrogressive step contravening the existing obligations of [M]ember States."[188]

A further issue arises where EU law specifies *minimum standards* to be implemented and applied by the Member States, but these fall below the standards required by international law. Framed as *minimum standards*, EU law is arguably not technically in contravention of international law, but they do create a very strong incentive for Member States to violate their international obligations. With Member States only facing repercussions within the EU if they fail to follow EU law, it is no surprise if their "good will" to follow international human rights treaties with no enforcement mechanisms falters.

One such set of *minimum standards* are codified in the EU Qualification Directive, which sets standards for determining who qualifies as a ref-

182. *Id.* at 11. *See also*, *e.g.*, ECHR, CULTURAL RIGHTS IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS, RESEARCH DIVISION OF THE EUROPEAN COURT OF HUMAN RIGHTS, (2011), *available at* http://www.echr.coe.int/NR/rdonlyres/F8123ACC-5A5A-4802-86BE-8CDA93FE58DF/0/RAPPORT_RECHERCHE _Droits_culturels_EN.pdf (illustrating the approach of the European Court of human Rights towards cultural rights).

183. *See generally* CRC, *supra* note 78.

184. *See* Charter of Fundamental Rights, *supra* note 49. *See also* Press Release, Council of Europe, Factsheet – Children's rights (Aug. 2013), *available at http://www.echr.coe.int/Documents/FS_Childrens_ENG.pdf* (discussing children's rights covered by the ECHR).

185. OHCHR STUDY, *supra* note 8, at 21.

186. ICESCR, *supra* note 78, art. 2(1).

187. Statement of the Committee on Economic, Social and Cultural Rights to the Convention to draft a Charter of Fundamental Rights of the European Union, *supra* note 49, ¶ 4, *available at*, www2.ohchr.org/english/bodies/cescr/docs/statements/EU.doc.

188. *Id.*

ugee and elaborates the content of international protection.[189] The Qualification Directive states that "Member States should have the power to introduce or maintain more favourable provisions than the standards laid down in th[e] Directive."[190] Unlike most EU legislation, the Qualification Directive also makes express reference to the governing international treaty, the Convention relating to the Status of Refugees ("Refugee Convention"), and states that the Refugee Convention is "the cornerstone of the international legal regime for the protection of refugees."[191]

Nevertheless, the Qualification Directive sets some standards that fall short of those required by the Refugee Convention. For example, the Convention relating to the Status of Refugees specifies in article 18 that States shall accord the right to self-employment to refugees when they are "*lawfully in* their territory."[192] Under the Refugee Convention, a refugee is considered to be "lawfully in" the territory of a host state in any of the following three situations: (a) when a refugee has been admitted to a state party's territory for a fixed period of time, even if only for a few hours; (b) during the stage between "irregular" presence and the recognition or denial of refugee status, including the time required for exhaustion of any appeals or reviews, and (c) when States divert refugees into so-called "temporary protection" regimes.[193] In contrast, the Qualification Directive authorizes refugees to engage in self-employment only "after [refugee status] has been granted."[194] The standard of the European Union regarding the right to self-employment is thus more restrictive than the international legal standard.

The Qualification Directive is a mix of standards that are lower, higher and the same as those required by Refugee Convention. It serves as a worrying example of how EU law, even when it expressly recognizes the governing international human rights instruments, treats international human rights law as a menu of rights to be selected from at will and with discretion. Faced only with direct repercussions if they fail to follow EU law, Member States are only happy to skirt their international legal obligations regarding the rights of refugees.

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189. *See, e.g.*, Council Directive 2011/95/EU, 2011 O.J. (L 337/9), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:EN:PDF [hereinafter Qualification Directive]. Article 3 specifies that "Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive." *Id.* art. 3.

190. *Id.* pmbl. ¶ 14.

191. *Id.* pmbl. ¶ 4; *see supra* p. 20 for a discussion of EU legislation

192. Convention relating to the Status of Refugees art. 18, Jul. 28, 1951 189 U.N.T.S. 2545 [hereinafter Refugee Convention], supplemented by the Protocol relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 8791 (emphasis added).

193. For a discussion of the meaning of "lawful presence" in the Refugee Convention, see JAMES HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW (2011), 173–84. For a detailed discussed of the five-stage level of attachment system set out in the Refugee Convention for the accrual of rights for refugees, see *id*. at 154–192.

194. Qualification Directive, *supra* note 189, art. 26(1).

This Part has examined the extent to which the EU has engaged with or overtly attempted compliance with the international human rights treaties in its delineation and definition of human rights. The picture is bleak. Despite the efforts of the monitoring bodies of key human rights treaties to ensure mention of and reference to those treaties, the EU's use of and reference to these treaties has been sporadic at best. In *South West Trains*, the ECJ went so far as to explicitly dismiss and disregard an Advisory Opinion of the Human Rights Committee. Of further concern is the scope of the rights included in the EU human rights regime, which covers only a small portion of the human rights enumerated in the international human rights instruments, and which technically bind the Member States.

In light of this analysis, it would appear that any extent to which the EU is in compliance with international human rights law is by virtue of its reliance on the ECHR and the constitutional traditions of the Member States to define its "general principles." Thus, I would argue, any measure of compliance by the EU is coincidental, rather than deliberate. Problems arise where the sources relied on by the EU are themselves deficient or inadequate, such as where a Member State fails to comply with its international human rights obligations or how the scope of the ECHR is limited to only a small portion of international human rights.

Conclusion

This Note has sought to demonstrate the way in which the EU is situated in a lacuna in the international human rights regime. To echo a concern expressed by the OHCHR, the EU and its current legal framework for human rights strike at the heart of the principle of universality on which human rights rests, both legally and conceptually.

Through the principles of supremacy and autonomy created and cemented in such seminal cases as *Costa v. ENEL, Internationale Handelsgesellschaft* and *Kadi*, the ECJ has defined the EU as an entity autonomous from other bodies of international law, including international human rights law. In recognizing the internal supremacy and primacy of EU law over municipal law in the area of human rights through the highly deferential *Solange II* standard, the Member States have lent credence and affirmation to this assertion of authority. In so doing, the Member States, although themselves bound by the international human rights instruments, extinguished the possibility that they might function as an external check on the EU human rights regime and as a means of indirectly binding the EU to international human rights law.

The ECtHR in *Bosphorus* created a similar deferential standard, which essentially amounts to an immunization of EU secondary legislation from review by the ECtHR. Between *Solange* and *Bosphorus*, the EU human rights regime, as it has defined itself, arises largely unchecked by any external judicial review mechanisms. In the absence of such external checks, the EU is left to ensure compliance with the international human rights instruments on its own initiative and goodwill, but the track record is bleak. The EU treaties make no reference to international human rights

instruments, and ECJ case law references have been sporadic at best, with not a single case relying expressly on an international human rights instrument to define and interpret a right within the EU human rights regime.

Situated in such a lacuna, the EU provides a critical example of how regional supranational organizations pose a threat to the international human rights regime. First, the EU has defined itself (largely affirmed by the Member States and ECtHR) as autonomous from this regime. As the EU has supremacy in its various and expanding areas of competence, this situation creates gaps in coverage by the instruments. To the extent that the EU exerts state-like functions in these areas of competence, there is no justification for exempting the EU from the international human rights regime. Second, such exemption of EU spheres of competence also places spheres traditionally and arguably still within the jurisdiction of the Member States beyond the reach of international human rights instruments. According to the law of treaties, the responsibility of the Member States does not end with regard to its obligations under international human rights treaties when it transfers competence to the EU. Nevertheless, the Member States appear to have acquiesced to this situation, allowing gaps in coverage to form within their territory and arguably placing the Member States in potential violation of international human rights law.

Third, the legal framework of the EU appears to have created a means and incentive for Member States to skirt their obligations under international human rights law. Due in part to the weak enforcement mechanisms of international human rights instruments, any such violation would go without repercussions. On the other hand, a failure by a Member State to comply with EU law or a judgment of the ECJ would place it in violation of EU law with very real consequences. *Grant v. South West Trains* illustrates just such a situation where an EU Member State (here the UK) chose to follow the ECJ interpretation of discrimination on the basis of sex, rather than comply with the Advisory Opinion of the Human Rights Committee. To the extent that EU law or ECJ judgments may be contrary to international human rights law, the EU legal framework (as affirmed by the Member States and the ECtHR) creates a strong incentive and "pull-factor" for Member States to comply with EU law at the expense of their international human rights obligations.

While the EU cannot be said at present to be in gross contravention of international human rights, the current legal framework in place indicates a systemic weakness and failure to adequately integrate the international human rights instruments and no internal (or external) mechanisms to otherwise ensure compliance.[195] While a number of legal arguments have been raised to try to bind the EU directly or indirectly to the international human rights instruments, such as the notion of functional succession, it is clear that the key judicial systems at play (the ECJ, ECtHR, and the Mem-

195. As of the writing of this article, a comprehensive right-by-right analysis tracking trends in divergence has yet to be conducted.

ber States) have not taken these into account, and a further solution is needed.

On April 5, 2013, the negotiators of the Council of Europe and the European Union took a critical step toward the accession of the EU to the European Convention on Human Rights and finalized a draft accession agreement.[196] Although it is expected that the final terms of accession will define a special relationship between the EU and ECtHR, which largely replicates the *Bosphorus* standard, the impending accession also indicates the EU's willingness to ratify and become a party to international human rights instruments. In light of this Note's analysis, ratification of international human rights instruments may be the surest way to mitigate the challenge the EU currently poses to the international human rights regime and ensure full and adequate protection of human rights in Europe.

196. The draft accession agreement is currently under review by the Court of Justice of the European Union (CJEU). *See* Press Release, Council of Europe, Milestone Reached in Negotiations on Accession of EU to the European Convention on Human Rights, No. DC041 (Apr. 5, 2013), *available at* https://wcd.coe.int/ViewDoc.jsp?Ref=DC-PR041%282013%29&Language=lanEnglish&Ver=original&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE.